APPEAL NO. 021239
FILED JULY 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 15, 2002. With respect to the single issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 9% in accordance with the amended report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the amended report of the designated doctor. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in giving presumptive weight to the amended report of the designated doctor and in deciding that the claimant's IR is 9%. The designated doctor initially examined the claimant and assigned an 18% IR, which was comprised of 5% for a specific disorder of the lumbar spine and 14% for loss of lumbar range of motion (ROM). The carrier had a doctor conduct a peer review of the designated doctor's IR and that report was forwarded to the designated doctor for him to consider its effect, if any, on the IR. On August 21, 1998, the designated doctor amended his report and reduced the claimant's IR from 18% to 9%. In the narrative accompanying his Report of Medical Evaluation (TWCC-69), the designated doctor explained that he had reduced the IR because his review of his original report revealed "some inconsistencies of the examinee's effort during the examination." Thus, the designated doctor determined that the claimant's lumbar flexion and extension ROM was invalid due to the observed inconsistencies. In a January 7, 2002, response to a request for further clarification from the Commission, the designated doctor again explained that he had disallowed the flexion and extension ROM figures because of the claimant's "lack of valid effort" in the original ROM examination.

In arguing that the hearing officer should not have given presumptive weight to the amended report of the designated doctor, the claimant cites two Appeals Panel decisions as controlling. The claimant initially cites Texas Workers' Compensation Commission Appeal No. 010297-s, decided March 29, 2001, in which we reversed a hearing officer's decision giving presumptive weight to an amended date of maximum medical improvement (MMI) because Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(b)(4)(B) (Rule 130.1(b)(4)(B)) requires that a complete medical examination be performed before a certification of MMI can be made. The claimant argues that the reasoning of Appeal No. 010297-s should apply to an amendment of an IR as well. That is, the claimant maintains that because the designated doctor in this instance did not reexamine the claimant prior to amending his report and reducing the claimant's IR, that amendment should not be given presumptive weight. We find no merit in the

claimant's argument that Appeal No. 010297-s mandates reversal here. Rule 130.1, which was the underpinning of Appeal No. 010297-s, only imposes requirements upon a doctor to certify a date of MMI. It does not impose the same requirements for a doctor to assign an IR. Thus, we cannot agree that there is an absolute requirement for a reexamination before a doctor can amend an IR. As such, under the facts of this case, the hearing officer did not err in giving presumptive weight to the amended IR which was made without the benefit of a reexamination.

The claimant also argues that the hearing officer erred in giving presumptive weight to the amended IR based upon Texas Workers' Compensation Commission Appeal No. 012114, decided October 3, 2001. In that case, we affirmed a hearing officer's decision giving presumptive weight to a designated doctor's initial report and rejecting an amended report, where the designated doctor had retested and invalidated ROM nearly a year after having obtained valid measurements and assigning a rating for loss of ROM. Appeal No. 012114 likewise does not necessitate reversal in this case. This is not an instance where the designated doctor retested the claimant after having obtained valid ROM measurements and then assigned a lower IR based upon the invalidity of the second ROM test. Rather, in this case, the designated doctor was asked some questions about his IR and in the process of reviewing his report and the documents in support thereof, he determined that the claimant's flexion and extension ROM ratings based on the original examination were invalid because the claimant failed to give a consistent effort in his ROM testing. We have long recognized that the designated doctor can invalidate ROM where he observes lack of consistent effort in testing. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 970252, decided March 31, 1997. Accordingly, the hearing officer did not err in giving presumptive weight to the amended report of the designated doctor and adopting the 9% IR.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
ACE USA
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.

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Elaine M. Chaney
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Gary L. Kilgore
Appeals Judge